

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 1:92:cv:659
v.	)	
	)	
THE UPJOHN COMPANY;	)	JUDGE RICHARD ALAN ENSLEN
KALAMAZOO COUNTY;	)	
CHARTER TOWNSHIP OF OSHTEMO;	)	
CITY OF KALAMAZOO,	)	
	)	
Defendants..	)	
	)	

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**SECOND AMENDMENT TO CONSENT DECREE**

**Introduction**

1. Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("U.S. EPA"), negotiated a Consent Decree ("Consent Decree") and a First Amendment to the Consent Decree ("First Amendment") with Settling Defendants, which were entered by this Court on November 17, 1992, and April 15, 2005, respectively. Pursuant to the Consent Decree and First Amendment, certain Settling Defendants – Pharmacia & Upjohn Company (f/k/a The Upjohn Company), Kalamazoo County, Charter Township of Oshtemo, and the City of Kalamazoo (the "Performing Settling Defendants")--are implementing the remedy selected by U.S. EPA in the September 28, 1990 Record of Decision ("1990 ROD") and the February 27, 2003 First Amendment to the Record of Decision ("2003 ROD"), for the West KL Avenue Landfill Superfund site, located on West KL Avenue in Oshtemo Township, Kalamazoo County, Michigan (the "Site"), and together with other Settling Defendants have paid, or are paying, certain response costs incurred and to be incurred by the United States for the Site.

2. As required by the Consent Decree at Appendix 1, the 1990 ROD, and at Appendix 2, the Scope of Work for the Remedial Design and Remedial Action Work Plan ("SOW"), the Performing Settling Defendants performed studies necessary for designing the Site remedy selected in the 1990 ROD. In addition, the Performing Settling Defendants expanded these studies, with U.S. EPA and Michigan Department of Environmental Quality ("MDEQ") approval and oversight, to investigate the potential for natural attenuation of contaminants in both the groundwater plume and source materials within the landfill wastes. These studies found, among other things, the existence of groundwater contamination in a location not previously identified or predicted, in the vicinity of the West KL Avenue Landfill. These studies did not conclusively identify the source(s) of this extended area of contamination, and have not eliminated the landfill

as a possible source.

3. U.S. EPA subsequently amended the remedy selected in the 1990 ROD through the 2003 ROD issued pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, (CERCLA), 42 U.S.C. §9605, and the National Contingency Plan, 40 C.F.R. Part 300 (NCP).

4. The 2003 ROD required a new municipal water service zone or alternative institutional controls, both on properties where groundwater contamination has been found and on properties in a buffer zone extending beyond the contaminated groundwater plume. The 2003 ROD prohibited potable groundwater use in the zone, restricted other groundwater uses, and provided for alternative water supplies including connections to the City of Kalamazoo's municipal water system. The 2003 ROD also revised the 1990 ROD groundwater cleanup standards, replacing the Michigan Act 307 type B standards with the current residential standards established under Part 201 of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (formerly known as Michigan Act 307). The First Amendment required the Performing Settling Defendants to implement the 2003 ROD and provided a schedule for the Performing Settling Defendants to conclude the natural attenuation studies while concurrently requiring them to prepare and submit the landfill cap design. The Performing Settling Defendants requested that EPA amend the 1990 ROD landfill cap design requirements.

5. On September 12, 2005, U.S. EPA further amended the remedy selected in the 1990 ROD, as amended by the 2003 ROD, by issuing the Second Amendment to the Record of Decision for the Site ("2005 ROD").

6. The 2005 ROD replaces the 1990 ROD landfill cap design requirements for a two-foot thick clay layer with a geosynthetic clay layer, and a 12-inch drainage layer with a geocomposite drainage layer. The amended cap design also reduces the two-foot thick layer of clean fill to eighteen inches. The amended landfill cap requirements will be as effective or more effective than the landfill cap required by the 1990 ROD. The Performing Settling Defendants began cap construction in November 2005.

7. The 2005 ROD revises the boundaries of the municipal water service zone established by the 2003 ROD, moving the boundary further downgradient to the west to include additional properties that have had site-related contaminants detected in their drinking water wells. The 2005 ROD further requires a minimum one-thousand foot distance between the downgradient boundary of the buffer zone and the location of any groundwater sample with Site-related contaminants detected above groundwater cleanup standards. By linking the width of the buffer zone to the location of Site-related contaminants in the groundwater, the 2005 ROD eliminates the need for any potential future ROD amendments addressing the areal extent of Site-related groundwater contamination, even if the areal extent of the Site-related contamination changes based on future sampling.

8. The 2005 ROD replaces the active pump and treat remedy for the contaminated groundwater plume, selected by the 1990 ROD, with Monitored Natural Attenuation (“MNA”) and contingent remedies. Extensive groundwater studies document that, with source control, MNA is expected to return the aquifer to a usable condition within a reasonable time-frame, as compared to the pump and treat system. The 2005 ROD requires monitoring to assess the MNA’s effectiveness, and requires implementing contingent remedies should MNA prove to be ineffective in remediating the groundwater contamination plume in a reasonable time. The 2005 ROD also requires a complete remedy evaluation every five years and, starting with the second five-year review, an evaluation of the need for additional source control measures. Consistent with Section VII (Additional Work and Modification of the SOW) of the Consent Decree, the Parties acknowledge that the Performing Settling Defendants may perform additional activities, subject to review and approval by U.S. EPA, including source control measures (e.g., active gas collection) to further increase the likelihood of remediating groundwater within a reasonable time period.

9. Plaintiff and Performing Settling Defendants (collectively, the “Parties to the Second Amendment”) have agreed to modify the terms of the Consent Decree, pursuant to Paragraph 85 of the Consent Decree and Paragraph 14 of the First Amendment, subject to the Court’s approval after opportunity for public comment, to require the Performing Settling Defendants to implement the provisions of the 2005 ROD.

10. Plaintiff and Performing Settling Defendants have agreed to modify the terms of the Consent Decree and First Amendment, by amending the Work that the Performing Settling Defendants are performing under the Consent Decree and First Amendment. Plaintiff and Performing Settling Defendants will move the Court to enter this Second Amendment after closure of a public comment period and review and preparation of response to any public comments received.

11. The Parties to this Second Amendment recognize, and the Court by entering this Second Amendment finds, that this Second Amendment has been negotiated by the Parties to the Second Amendment in good faith and is fair, reasonable, and in the public interest.

NOW THEREFORE, without adjudication of any issue of fact or law, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

General Provisions of this Second Amendment

12. a. All terms and phrases in this Second Amendment shall be defined as provided in the Consent Decree and First Amendment, except as specifically provided in this Second Amendment.
- b. The rights and obligations under the Consent Decree and First Amendment of the Settling Defendants and the United States are not modified except as specifically provided in this Second Amendment to the Consent Decree.

c. Pursuant to Paragraph 14 of the First Amendment, the right to individual notice and approval of this Second Amendment applies only to the Performing Settling Defendants and the United States. In the First Amendment, the United States and Settling Defendants agreed that any future material modification of the Work would only require written agreement among the United States and the Performing Settling Defendants, along with public notice and comment, and the Court's approval and entry. This Second Amendment adds to or changes settlement obligations of the Performing Settling Defendants through a material modification of the Work, but does not add to or change any of the settlement obligations of any other Settling Defendants and, except for the Performing Settling Defendants, none of the Settling Defendants will have any obligation to implement the provisions of the 2005 ROD.

13. The Consent Decree, Appendix 2, "Scope of Work for the Remedial Design and Remedial Action Work Plan at West KL Avenue Landfill, Kalamazoo, Michigan ("Consent Decree SOW")" and First Amendment, Appendix 1, "Modification of Appendix 2, Scope of Work for the Remedial Design and Remedial Action Work Plan at West KL Avenue Landfill, Kalamazoo, Michigan ("First Amendment SOW")," are amended by Appendix 1 to this Second Amendment, attached and incorporated herein by reference, entitled: "Second Modification of Appendix 2, Scope of Work for the Remedial Design and Remedial Action Work Plan at West KL Avenue Landfill, Kalamazoo, Michigan ("Second Amendment SOW")." In addition to delineating Work activities to be performed by Performing Settling Defendants under this Second Amendment, Appendix 1 to this Second Amendment is inclusive of Work activities in the Consent Decree SOW and First Amendment SOW, some of which have been completed by Performing Settling Defendants.

14. The Performing Settling Defendants shall begin implementing the provisions of this Second Amendment within 30 days of lodging of this Second Amendment.

15. Except as provided above, all of the terms, provisions, covenants and conditions of the Consent Decree and First Amendment, shall continue in full force and effect and shall be fulfilled by the Parties, in accordance with the Consent Decree and the First Amendment.

16. Lodging and Opportunity for Public Comment.

a. This Second Amendment shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. Section 9622(d)(2), and 28 C.F.R. Section 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding this Second Amendment disclose facts or considerations which indicate that the Second Amendment to the Consent Decree is inappropriate, improper, or inadequate. Performing Settling Defendants consent to the entry of this Second Amendment without further notice.

b. If for any reason the Court should decline to approve this Second Amendment in the form presented, this Second Amendment is voidable at the sole discretion of the United States or the Performing Settling Defendants and its terms may not be used as evidence in any litigation whether or not between the United States and the Performing Settling Defendants.

17. Each undersigned representative of a Performing Settling Defendant to this Second Amendment and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Second Amendment and to execute and legally bind such party to this document.

18. Each Performing Settling Defendant agrees not to oppose entry of this Second Amendment by this Court or to challenge any provision of this Second Amendment unless the United States has notified the Performing Settling Defendants in writing that it no longer supports entry of the Second Amendment.

19. Each Performing Settling Defendant agrees to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

20. The Court finds that this Second Amendment is fair, reasonable and in the public interest.

21. This Second Amendment shall be effective on the date of entry by this Court, except that the provisions of Paragraph 14 regarding implementation of the provisions of this Second Amendment by Performing Settling Defendants shall be effective upon the date of lodging of this Second Amendment.

IT IS SO AGREED:



## DEFENDANTS,

The undersigned Performing Settling Defendant hereby consents to the Second Amendment to the Consent Decree in U.S. v. West KL Avenue Landfill, et al.

County of Kalamazoo

Name of Performing Settling Defendant (Type)


201 W. Kalamazoo Ave.

Kalamazoo, MI 49007

Address

By: Thomas M. Canny

Name of Officer (Type)

(Signature of officer) 

Corporate Counsel

Title

July 2, 2007

Date

(Place corporate seal and acknowledgment of authority of officer to sign here)

If different from above, the following is the name and address of this Settling Defendant's agent for service of process:

Name

Address

DEFENDANTS,

The undersigned Performing Settling Defendant hereby consents to the Second Amendment to the Consent Decree in U.S. v. West KL Avenue Landfill, et al.

Charter Township of Oshtemo

Name of Performing Settling Defendant (Type)

7275 West Main Street

Kalamazoo, MI 49009

Address

By: John VanDyke

^ Name of Officer (Type)

(Signature of officer)

Supervisor

Title

July 2, 2007

Date

(Place corporate seal and acknowledgment of authority of officer to sign here)

STATE OF MICHIGAN }  
COUNTY OF KALAMAZOO } ss

Subscribed and sworn to before me, a notary public, on this 2nd day of July, 2007, John VanDyke, the Supervisor of Oshtemo Charter Township, a Michigan Charter Township, signed this document by Oshtemo Charter Township Board authority.

Linda Ignasiak, Notary Public  
Van Buren County, State of Michigan  
Acting in Kalamazoo County, Michigan  
My commission expires: 06-05-2012

If different from above, the following is the name and address of this Settling Defendant's agent for service of process:

Michael B. Ortega

Name

Lewis Reed & Allen P.C.

136 E. Michigan Avenue, #800, Kalamazoo, MI 49007

Address



The undersigned Performing Settling Defendant hereby consents to the Second Amendment to the Consent Decree in U.S. v. West KL Avenue Landfill, et al.

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Address

PLAINTIFF, UNITED STATES OF AMERICA:

By: \_\_\_\_\_

Ronald J. Tenpas /  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice

12 Sept. 2007  
Date

By: \_\_\_\_\_

Francis J. Biros /  
Trial Attorney  
Environmental Enforcement Section  
United States Department of Justice  
P.O. Box 7611, Ben Franklin Station  
Washington, D.C. 20044  
(202) 616-6552

9/12/07  
Date

Charles R. Gross  
United States Attorney  
Western District of Michigan

By: \_\_\_\_\_

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

By: \_\_\_\_\_

Richard C. Karl  
Director, Superfund Division  
U.S. Environmental Protection Agency  
Region V  
77 West Jackson Boulevard  
Chicago, Illinois 60604

8-23-07

\_\_\_\_\_  
Date

ENTERED, this \_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
JUDGE

United States District Judge